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No. 89-1835

In The

Supreme Court of the United States

October Term 1989

KELVIN H. KEITH,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PAN AMERICAN WORLD AIRWAYS, INC. CERTAIN CLAIMANTS, MORGAN D. KING,

Respondents.

RESPONDENT PAN AMERICAN WORLD AIRWAYS, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether, in an enforcement action brought by the Equal Employment Opportunity Commission ("EEOC"), under §§ 216(c) and 217 of the Fair Labor Standards Act, 29 U.S.C. §§ 216(c) and 217, charging violations of the Age Discrimination in Employment Act, 29 U.S.C. § 623 ("ADEA"), the EEOC may properly exercise its discretion by refraining from including Petitioner in the monetary provisions of a settlement, when Petitioner failed to respond to notices of the lawsuit which he received.

PARTIES TO THE PROCEEDINGS BELOW

Respondent Pan American World Airways, Inc. ("Pan Am") concurs with Petitioner's statement identifying the parties to the proceedings below, except that the Airline Pilots Association, International and the Flight Engineers International Association, Pan Am Chapter, were also parties to the District Court proceedings although they did not take part in the appeal. In addition, Pan Am notes that the objector-claimant Morgan D. King, the only other objector who filed an appeal from the District Court's Order Approving Settlement and Consent Decree, has not filed any petition for certiorari. *See* Statement Regarding Filing of Morgan D. King, *infra* at p. 1.

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Respondent Pan Am concurs with Petitioner's statement regarding the opinions below, and incorporates by reference Petitioner's Appendix, which includes such opinions.

JURISDICTIONAL GROUNDS

Petitioner invokes this Court's certiorari jurisdiction under 28 U.S.C. § 1254(1). Respondent Pan Am does not dispute that the petition is timely. However, Pan Am submits that pursuant to Supreme Court Rule 10, there is no reason why the Court should exercise its discretion to grant certiorari in this case.

STATEMENT REGARDING FILING OF MORGAN D. KING

Morgan D. King, a former pilot, appealed the District Court's Order Approving the Consent Decree, but thereafter explicitly agreed to settle this matter by refraining from seeking certiorari in exchange for Pan Am's agreement not to seek to recover its costs of appeal from Mr. King. Mr. King has now filed a "Response in Support" of Mr. Keith's petition for writ of certiorari. We urge the Court to disregard it because such a filing is wholly unauthorized. It is, in reality, either a disguished certiorari petition that is untimely, or an amicus brief for which Mr. King has neither sought nor obtained the parties' consent or leave of Court pursuant to Supreme Court Rule 37.

RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 216:

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a

reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint

by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work

performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be –

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in

accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title.

29 U.S.C. § 217:

The District Courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(1)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

29 U.S.C. § 255:

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.] –

> (a) if the cause of action accrues on or after May 14, 1947 – may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless

commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

(b) if the cause of action accrued prior to May 14, 1947 – may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period described by the applicable State statute of limitations; and, except as provided in paragraph (c) of this section, every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to May 14, 1947, the action shall not be barred by paragraph (b) of this section if it is commenced within one hundred and twenty days after May 14, 1947 unless at the time commenced it is barred by an applicable State statute of limitations;

(d) with respect to any cause of action brought under section 216(b) of this title against a State of a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.

29 U.S.C. § 623:

(a) It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against

any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) It shall be unlawful for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for

employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization –

> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g)

(1) For purposes of this section, any employer must provide that any employee aged 65 or older, and any employee's spouse aged 65 or older, shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee and the spouse of such employee, under age 65.

(2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of Title 26.

(g)

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the –

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

29 U.S.C. § 626:

(a) The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce jurisdiction to grant such this chapter the court shall have jury legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including

without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c)

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any *alleged unlawful practice by informal methods of conciliation,* conference, and persuasion.

(e)

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

29 U.S.C. § 627:

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

STATEMENT OF THE CASE

Nearly nine years ago, in 1981, the EEOC filed this action against Pan Am, alleging that Pan Am's policy toward pilots who wished to continue flying as flight engineers after they reached age 60 (when, under a Federal Aviation Administration rule, they could no longer fly as pilots) discriminated on the basis of age, in violation of the Age Discrimination in Employment Act ("ADEA"). This is *not* a class action under Federal Rule of Civil Procedure 23. It is an EEOC "enforcement action" under Section 16(c) of the ADEA. *See* 29 U.S.C. §§ 216(c), 217.

Petitioner, a retired Pan Am pilot, showed no interest in any age discrimination claim he might have against Pan Am – despite having received actual notice of this case and an invitation to participate in it from the EEOC – until after this case was resolved by a consent decree and a substantial monetary settlement. This resolution was accomplished after many years of vigorous litigation, widely publicized among Pan Am pilots, and indeed after a two-month-long jury trial was nearly complete.

Petitioner urges that EEOC did not give adequate notice and that the lower courts deprived him of due process of law by approving the settlement. He does so despite the factual findings of both lower courts that he himself did have notice of the action (including notice that his failure to respond might result in his exclusion from the EEOC's recovery efforts) (Petitioner's Appendix at 55) – and despite clear authorities establishing that claimants like Petitioner have no individual ADEA claims that survive the filing of an EEOC action, declaring that the EEOC has the primary role in enforcing the ADEA,

and holding that Rule 23 is inapplicable to this type of case.

We adopt the factual synopsis and procedural history set forth in the Court of Appeals' opinion below (*see* Petitioner's Appendix at pp. 11-30; *see also* District Court's opinion, Petitioner's Appendix at 69-74) and do not repeat that discussion in detail here. Two points must be emphasized, however. First, although Petitioner focuses on the fact that some retired pilots were not sent either of the two written notices about this case which are reprinted in the Court of Appeals' opinion,[1] Petitioner himself is not one of those pilots.[2] As both of the courts below found, Petitioner *was* sent both notices, properly addressed, and his claims of ignorance about this case are otherwise "not credible" in light of the substantial publicity that has attended this litigation and the issue involved. (Petitioner's Appendix at 55-56, 88, 97, 121-27.) Second, even as to other objectors, the District Court also found that "the only Objector Pilots who can credibly claim they were not sent notice – Metcalf and King –

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[1] *See* EEOC notice letter, Petitioner's Appendix at 13-14; Captain Ray Egan's memorandum, published in Pan Am retired pilots' newsletter, Petitioner's Appendix at 17-20.

[2] Mr. King, who has filed a belated "response" to the petition, was apparently not sent the EEOC's notice letter, but he was sent the Egan memorandum (although his address contained a typographical error in the zip code). (Petitioner's Appendix at 93-94). The District Court found Mr. King's claim of ignorance about this case to be "not credible." *Id.* at 97. In any event, Mr. King's claims should be disregarded because he has not filed any timely petition for certiorari, nor does he have either the parties' consent nor this Court's leave to appear as amicus.

knew of the lawsuit by other means." (Petitioner's Appendix at 121-22.) (Neither of these objectors has sought review here.)

Although Petitioner once denied receiving either the EEOC's letter or the newsletter, he does not do so now. Instead he challenges the EEOC's notice procedures as to other former pilots, accuses Pan Am and the EEOC of improper motives for not using other procedures, and offers various purported statistics about those other former pilots who were not sent the notices involved – all the while failing forthrightly to inform the Court that he himself is not in that category at all. Petitioner's arguments about other former pilots who allegedly were not sent any notice of the case are simply irrelevant. No such former pilots are now challenging the settlement.[3] Given the now undisputed fact that Petitioner did have notice of this action,[4] the only question Petitioner can properly

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[3] When the settlement was presented to the District Court for its approval, an extensive fairness hearing was conducted at which eight objectors, including Petitioner, challenged the settlement on notice-related bases, contending that they had no notice of the action until the settlement was publicized. Some of those were not addressees of the EEOC's notice letter. In other cases, their addresses had contained typographical errors. Some were not sent the newsletter. As stated above, however, Petitioner was sent *both* notices, correctly addressed. Both lower courts found that all of these objectors had actual notice.

[4] Petitioner apparently does not seek review of the lower courts' findings that he had actual knowledge of this lawsuit. Even if he were to do so, the "two court rule" would make such findings virtually irrebuttable. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n. 2 (1975); *Blau v. Lehman*, 368

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present is whether Petitioner was nevertheless entitled to a full-fledged Rule 23-type notice of this case, and the authorities are clear that he was not.

The Court of Appeals found that the consent decree does not prejudice any rights Petitioner might have under the ADEA, because his right to bring a private ADEA action terminated upon the EEOC's commencement of this enforcement action.[5] (Petitioner's Appendix

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U.S. 403, 408-409 (1962); *Faulkner v. Gibbs*, 338 U.S. 267, 268 (1949); *Graver Tank & Mfg. v. Linde Air Products*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"); *United States v. Dickinson*, 331 U.S. 745, 751 (1947).

[5] Under Section 7(c)(1) of the ADEA, the filing of this suit terminated former pilots', including Petitioner's, rights to bring ADEA actions against Pan Am based on the facts alleged in this suit. *See also* Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 217, incorporated by reference into the ADEA in Section 7 thereof, 29 U.S.C. § 626(b). Pan Am does not intend to suggest that the EEOC, having terminated individual claims by filing suit, could have settled this case in an arbitrary or capricious fashion – favoring or disfavoring particular employees based on race or hair color, for example – without implicating due process concerns. Had it done so, this Court's intervention might well be necessary. This is not such a case, however. Here the EEOC made an eminently reasonable decision, well within its discretion, to exclude from the settlement persons who had not come forward during many years of active and well-publicized litigation, who had not responded to its notice letter, and who had been content to let their personal claims lapse under the applicable statute of limitations and claim filing requirements. See *EEOC v. Eastern Air*

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at 47.)[6] The Court of Appeals specifically held that due process did not require the government specifically to notify Petitioner or other former pilots of that self-executing statutory bar to subsequent individual litigation. (Petitioner's Appendix at 37-43; 59-60.) Moreover, both courts found that even if claimants like Petitioner retained any constitutionally protectible interest, due process was provided to Petitioner because he had actual knowledge of the pendency of this action and in fact received the EEOC's notice. (*See* discussion *supra*.) As we discuss below, the appellate court's decision is not in conflict with any other decisions of the appellate courts, or of this Court, nor is there any other reason why this Court should grant certiorari.

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Lines, 97 F.R.D. 646, 650-51 (S.D. Fla. 1983) (EEOC's decisions as to how to conduct the case and how to settle it are "invested with a heavy dose of discretion"). As the District Court stated, "[t]he fact that a government agency took part in the settlement negotiations is an important factor in weighing the overall fairness of the settlement." (Petitioner's Appendix at 134, *citing Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977); *Securities & Exch. Comm'n v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) ("the courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment").)

[6] The Court of Appeals expressly noted that any state law claims that Petitioner might still have survived the filing of this action and the Consent Decree. (Petitioner's Appendix at 51, n. 8.)

DISCUSSION

A. The Court of Appeals' Decision Does Not Conflict With Any Other Appellate Decision Or Any Decision Of This Court.

We adopt the lower courts' detailed discussions of the ADEA's statutory scheme (*see* Petitioner's Appendix at 34-43, 56-57, 104-117). As both of the lower courts discussed in detail, the age discrimination statute "plainly gives the EEOC the dominant role in enforcing the ADEA." (Petitioner's Appendix at 37). Thus, the EEOC has

> broad discretion in conducting enforcement actions. It can extinguish private individuals' causes of action, shape the nature of the relief sought and administer the distribution of any settlement or award. It cannot be compelled to sue on behalf of an individual, nor must it permit individuals to intervene. Its representation is presumptively adequate. As one court has stated, "[b]ecause the ADEA 'creates a remedy for an injury not compensable at common law', *Jaeger v. American Cyanamid Co.*, 442 F. Supp. 1270, 1272 (E.D. Wis. 1978), the procedural conditions that are inextricably interwoven in, and limit the availability of, the rights granted therein are generally permissible, and must be tolerated as 'the bitter with the sweet', *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974)." *EEOC v. Consolidated Edison Co. of New York, Inc.*, 557 F. Supp. 468, 474 (S.D.N.Y. 1983). In this regard, "[n]o distinction need be drawn between the EEOC's claim stating and claim settling functions, both of which are invested with a large dose of discretion." *EEOC v. Eastern Air Lines, Inc.*, 97 F.R.D. 646, 950-51 (S.D. Fla. 1983).

Petitioner's Appendix, pp. 113-14.

The conclusion drawn by both of the lower courts, that the EEOC acted well within its discretion when it decided to settle this action without including any monetary provisions for persons like Petitioner – whose personal claims were terminated, and who had shown no interest in such claims – was inescapable. It flowed from the following well-settled principles concerning ADEA actions:

(1) Although private ADEA actions are permitted unless and until the EEOC files suit, the right to bring such an action terminates upon the commencement of an action by the EEOC. 29 U.S.C. § 626(c)(1); 29 U.S.C. 216(b).

(2) The statutory structure plainly contemplates that the EEOC shall have the "dominant role in enforcing the ADEA." (Petitioner's Appendix at 37.) ADEA suits brought by the EEOC have "priority over private suits." (*Id.* at 40.) Private lawsuits are "secondary in the statutory scheme." (*Id. See also Deane v. American Sec. Ins. Co.*, 559 F.2d 1036, 1038 (5th Cir. 1977), *cert denied* 434 U.S. 1066 (1978).) Thus, for example, aggrieved employees have no right to intervene in EEOC enforcement actions like this one. (*See EEOC v. Boeing Co.*, 109 F.R.D. 6, 10 (W.D. Wash. 1985); *see also* the District Court's discussion at pp. 112-113.)[7]

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[7] In his "response" to the petition, Mr. King quotes *McClain v. Wagner Electric Corp.*, 550 F.2d 1115 (8th Cir. 1977) as supporting the proposition that the EEOC may not cut off the claims of individual employees without their consent. That case, however, was not brought under the ADEA but under the Civil Rights Act of 1964, which does not provide for the termination of individual claims upon the filing of EEOC actions, and which provides for intervention in EEOC suits by aggrieved employees. *Id.* at 1119. Moreover, even in such a case

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(3) The EEOC's decisions regarding its conduct of an ADEA enforcement action are "invested with a heavy dose of discretion." *EEOC v. Eastern Air Lines*, 97 F.R.D. at 650-51. The EEOC's representation is "statutorily, and thus conclusively, determined to be [adequate]." *EEOC v. Consolidated Edison Co. of New York*, 557 F.Supp. 468, 472 (S.D. N.Y. 1983).

(4) Although courts may in their discretion permit or require notice to putative class members in *private* ADEA actions brought pursuant to Section 16(b) (*Hoffman-LaRoche v. Sperling*, ___ U.S. ___, 110 S.Ct. 482 (1989)), nothing in the ADEA requires the EEOC to provide notice to potential claimants of an enforcement action brought under § 16(c). *See* 29 U.S.C. §§ 216(c), 626(b); 29 C.F.R. § 1626.15.[8] *See also Donovan v. University of Texas*, 643 F.2d 1201, 1208 (5th Cir. 1981).

(5) An EEOC enforcement action such as this one is not a class action, and Rule 23 is inapplicable. *General*

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the court suggested that intervention should be denied when, as here, the litigation is far advanced, the latecomer advances no reason for his delay, the would-be intervenor had "knowledge of the pendency of the action in question," and the existing parties will be prejudiced by the intervention. *Id.* at 1120.

[8] Rather than requiring the EEOC to notify employees of pending actions, Congress required employers to post general notices in the work place informing employees of their rights under the ADEA. *See* ADEA Section 8, 19 U.S.C. § 627; 29 C.F.R. § 1627.10. This notice is designed "so that one may reasonably conclude that the employees either knew or . . . should have known of their statutory rights." *Charlier v. S.C.Johnson & Son*, 556 F.2d 761, 764 (5th Cir. 1977); *see also Edwards v. Kaiser Aluminum & Chemical Sales*, 515 F.2d 1195, 1197 (5th Cir. 1975).

Telephone Co. v. EEOC, 446 U.S. 318, 326 (1980); *Naton v. Bank of Cal.*, 649 F.2d 691, 693 (9th Cir. 1981); *Donovan v. University of Texas*, 643 F.2d at 1208.

These clearly established principles mandated the lower courts' decisions. Petitioner ignores the fact that this action was brought pursuant to the ADEA's specialized statutory scheme when he suggests that the Ninth Circuit's opinion conflicts with various decisions of this Court. Because the cases upon which he relies are not ADEA enforcement actions, they are inapplicable.

For example, Petitioner relies heavily upon *Hoffman-LaRoche v. Sperling*, ___ U.S. ___, 110 S.Ct. 482 (1989), in which this Court ruled that a district court may, *in its discretion*, permit, require, or supervise notice to potential claimants in a private action brought by individual employees pursuant to 29 U.S.C. § 216(b). The *Sperling* decision is not germane to the question submitted for review here. *Sperling* was filed and litigated as a private ADEA class action under 29 U.S.C. § 216(b). 110 S.Ct. at 486. The *Sperling* court decided "the narrow question" whether a district court *may* authorize and facilitate notice to potential class members in a private ADEA action, and held that district courts have the discretion to do so. The Court explicitly did not consider or decide "the details of [the] exercise [of discretion]." *Id. Sperling* does not in any way address any questions concerning ADEA enforcement actions brought by the EEOC. Nor does it require any notice, even within the context of a *private* ADEA action, and certainly not in an EEOC enforcement action.

Petitioner also posits that the appellate decision below conflicts with the Court's decision in *Martin v. Wilkes*, ___ U.S. ___, 109 S.Ct. 2180 (1989). That case is also inapplicable to this one. In *Martin*, white firefighters challenged certain employment decisions made pursuant to a consent decree in a prior Title VII suit brought against the employer by black firefighters. The white firefighters claimed in essence that the consent decree purported to permit "reverse discrimination" against them. The question was whether, as non-parties to the previous litigation, the white firefighters could thus collaterally attack the previous settlement. This Court held that they could, relying on ordinary principles of civil procedure under which judgments generally are not binding on absent parties. *Id.* at 2184.

Like *Sperling*, *Martin* is inapposite. In *Martin*, the underlying suit had been a private lawsuit under Title VII, not an EEOC enforcement action under the ADEA, the filing of which itself terminated private rights. By its terms, the statute creating the federal right to be free of age discrimination also limits that right, making the EEOC the sole cognizable plaintiff – and presumptively adequate representative of the public interest[9] – once it

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[9] It is important to note that the plaintiffs in *Martin* challenged arguably discriminatory employment decisions which were made pursuant to the previous consent decree. If they had not been permitted to do, the result might be that an employer could gain a license to discriminate against certain groups by settling cases brought by other groups. Here, in contrast, Petitioner does not claim that the settlement impermissibly allows Pan Am to discriminate in employment, which

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files an action. As the Ninth Circuit observed in this case, it was not the consent decree that terminated Petitioner's rights, it was the filing of the complaint. (Petitioner's Appendix at 50.) Since the previous case in *Martin* had been a private Title VII suit, this circumstance was plainly not present in that case. This is not a case to which the ordinary rules of civil procedure discussed in *Martin* apply.[10]

Indeed this case fits within the exception noted in the *Martin* decision itself. The Court stated that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants . . . legal proceedings may terminate preexisting rights if the scheme is consistent with due process." 109 S.Ct. at 2184, n. 2. Here, precisely such a "special remedial scheme" exists. As to Petitioner (at the very minimum), it is fully consistent

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it plainly does not. Petitioner presumably supports the injunctive provisions of the decree, which prohibit the allegedly discriminatory practices and include various remedial provisions, but seeks to undo the settlement, including its injunctive provisions, because he does not share in its financial proceeds. The policy concerns implicated in *Martin* are thus the reverse of those in this case.

[10] Moreover, in *Martin* the plaintiffs brought timely discrimination claims, rather than allowing their own claims to lapse under the applicable statute of limitations and then attacking a settlement, as Petitioner has done here. Even if the ADEA did not explicitly provide that private rights terminate when the EEOC files suit, the settlement in this case would not extinguish any right of Petitioner's that would otherwise exist, an important difference between this case and *Martin*.

with due process because he had actual notice. (Petitioner's Appendix at 55-56.) The broad holding of *Martin*, that absent special circumstances non-parties may not be bound by consent decrees, is thus inapplicable to this case. As the Court of Appeals stated, the consent decree "does not prejudice the objectors' rights because they had no rights left to prejudice." (Petitioner's Appendix at 50.)[11]

B. This Case Does Not Otherwise Meet The Guidelines Set Forth In Supreme Court Rule 10.

Petitioner also suggests that the statutory framework which provides the EEOC with the primary authority to enforce the ADEA, and terminates individual rights upon

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[11] The Court of Appeals also affirmed the District Court's finding that Petitioner (and Mr. King as well) were "familiar with the substance of [the EEOC's] notice" (Petitioner's Appendix at 55) and ruled that "[a]ctual knowledge of the pendency of an action removes any due process concerns about notice of the litigation" that might otherwise arise under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and similar cases. *Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279 (1962), relied on by Mr. King, does not change this result. In that case, which involved published notices of condemnation proceedings and a landowner's right to contest such proceedings, there was no question about the landowner's ignorance of such proceedings. (Nor, of course, did the case involve the ADEA in any way.) Mr. King also cites *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965 (1985), but that case, a Rule 23 class action, does not support the proposition for which he cites it. It holds that there is *no* due process requirement that absent class members must affirmatively "opt in" in order to be bound. And it says nothing about the rights of absent class members who, whether or not they were sent notice, in fact had knowledge of the suit.

the filing of an EEOC suit, is unconstitutional under the due process clause unless the ADEA is interpreted so as to require the EEOC to provide Rule 23-type notice. This is a question that should not be resolved pursuant to this petition, because – although Petitioner attempts to obscure the facts relating specifically to himself – he received at least two detailed written notices of this case.[12]

Because Petitioner is not one of the former pilots who failed to receive notice of this case, as discussed above, the only due process question he may properly present to this Court is a very narrow one: whether, in an enforcement action such as this one, the EEOC must not just notify a potential claimant about the suit it has filed, and that the claimant may not share in any recovery absent a response to the notice, but must *also* explicitly and in detail inform the claimant that his individual rights have been terminated. Petitioner has no standing to present any other question about the means of notice employed in this case.[13]

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[12] Petitioner seems to suggest that even if this case does not conflict with any other court decisions, the lower courts "so far departed from the accepted and usual course of judicial procedure" as to call for an exercise of this Court's certiorari jurisdiction under Supreme Court Rule 10(1)(a). Alternatively, Petitioner seems to be suggesting that the lower court decided "an important question of federal law which has not been, but should be, settled by this Court," within the meaning of Rule 10(1)(c). Because Petitioner had actual notice, however, his petition and this case are not proper vehicles for this Court to consider the question whether the settlement of this case, absent actual notice to all potentially interested parties, violates fundamental notions of due process.

[13] A litigant " 'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or

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This narrow issue is not the kind of question that calls for resolution by this Court. Indeed, it has already been resolved by the several cases, cited in both of the lower courts' opinions, making it clear that the EEOC need not notify potential claimants of this type of case at all. (*See* Court of Appeals opinion, n.10, Petitioner's Appendix at 56-57.) Moreover, it is already settled in analogous Supreme Court cases cited by the Ninth Circuit herein that due process does not require the government to notify individuals of the existence of self-executing bars to litigation. *Atkins v. Parker*, 472 U.S. 115 (1985), and *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). (See Petitioner's Appendix at 59-60.)

To the extent that Petitioner seeks to impart an aura of constitutional significance to this matter by making sweeping charges about the EEOC's failure to send any notice to certain pilots, and its failure to follow up on known pilots for whom it had no addresses, the attempt

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interests of third parties.' " *United States Dept. of Labor v. Triplett*, ___ U.S. ___, 110 S.Ct. 1428, 1431 (1990) (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1982) (citation omitted)); *Warth v. Seldin*, 422 U.S. 490, 499, 518 (1975). In *Tyler v. Judges of Court of Registration*, 179 U.S. 405 (1900), the plaintiff, who had actual notice of land title registration proceedings asserted a due process challenge to the statutory notice proceeding. The Court dismissed the writ of error, holding that plaintiff, having actual notice, could not question the statutory notice provisions. *See also American Power Co. v. S.E.C.*, 329 U.S. 90, 107 (1946) (company had no standing to challenge statute based on its security holders' constitutional rights to notice and hearing.)

should fail even if Petitioner were one of those pilots who did not receive notice. As both of the courts below held, and as discussed above, it is well-established that the claimants in this case had no constitutionally protected interest in their claims once the EEOC filed suit. Moreover, even if some standardized form of notice might be desirable in most ADEA actions, this highly publicized case, about which no former Pan Am pilot could credibly claim ignorance (Petitioner's Appendix, pp. 17-24), is not the proper case in which to test that proposition.

Contrary to Petitioner's suggestion that hundreds or thousands of people are affected by this matter, Petitioner's position appears to be unique. Mr. King's unauthorized "response" to the petition notwithstanding, Petitioner is now the sole person pursuing an objection to this settlement.[14] On the other hand, further delay in finalizing this matter will force over 100 elderly former pilots to continue to wait – as they have already waited for nearly a decade – for their shares of the settlement fund.

In sum, the narrow issue which Petitioner presents is one that has in fact been resolved by analogous precedents and in any event is not one which requires this Court's supervision.

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[14] It is notable that Mr. Keith is an attorney, who was capable of contacting the attorneys in this case to ascertain its scope if there were any ambiguities in the EEOC's letter or the newsletter, both of which he was found to have received. Moreover, it would be fundamentally unfair if Petitioner, by asserting broad claims as to which he has no standing, could overturn the consent decree in this case on behalf of objector-claimants who might have asserted such claims, but who consciously chose not to file any appeals, or not to pursue them.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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